BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BILLY HEGWALD	)	
Claimant	)	
VS.	)	
	)	Docket No. 236,512
ADVANCE SYSTEMS HOMES	)	
Respondent	)	
AND	)	
	)	
TIG INSURANCE COMPANY AND	)	
KANSAS BUILDING INDUSTRY WC FUND	)	
Insurance Carriers	)	

ORDER

Respondent and one of its insurance carriers, TIG Insurance Company, request Appeals Board review of Administrative Law Jon L. Frobish's June 29, 2000, Award. The Appeals Board heard oral argument on March 21, 2001.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Stephen J. Jones of Wichita, Kansas, appeared for respondent and its insurance carrier TIG Insurance Company. Matthew S. Crowley of Topeka, Kansas, appeared for respondent and its insurance carrier Kansas Building Industry Workers Compensation Fund.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

Issues

This is a claim for a low back injury that claimant alleges occurred as he performed heavy and strenuous work activities while employed by the respondent. Clamant contends he initially aggravated a preexisting low back condition on November 15, 1996, and continued to aggravate and make the condition worse until he was taken off work on November 30, 1998.

The Administrative Law Judge (ALJ) found claimant suffered a permanent aggravation of a preexisting low back condition caused by claimant's everyday heavy work activities culminating on November 30, 1998. Thus, the ALJ found November 30, 1998, as claimant's appropriate accident date because he suffered repetitive injuries over a period of time. As a result of claimant's work-related injury, the ALJ found claimant sustained a 74.5 percent work task loss and a 100 percent actual wage loss, entitling claimant to a 87.25 percent work disability resulting in a permanent partial general disability award of the statutory maximum of $100,000.[1] Also, the ALJ awarded claimant 22.07 weeks of temporary total disability compensation for the period from November 30, 1998 through April 14, 1999.

On appeal, respondent and its insurance carrier, TIG Insurance Company (TIG), contend the more persuasive and convincing evidence establishes that claimant suffered a work-related accident on November 15, 1996, and that one accident permanently aggravated claimant's preexisting low back condition and made it worse. But TIG further argues that claimant's work activities after November 15, 1996, through November 30, 1998, did not cause any permanent worsening of his low back condition. Thus, TIG argues claimant's accident date is November 15, 1996, and therefore TIG does not have any responsibility for any compensation awarded in this case, because TIG, on November 15, 1996, did not provide workers compensation coverage for the respondent. TIG's coverage period did not start until January 15, 1998. Additionally, TIG argues that any subsequent period of temporary total disability is likewise not its responsibility because all compensation flows from the single November 15, 1996, accident date.

In contrast, respondent's insurance carrier which would be on the risk for the alleged November 15, 1996, accident, Kansas Building and Industry Workers Compensation Fund (KBI), requests the Appeals Board (Board) to affirm the Award. KBI contends that the evidence contained in the record clearly established that claimant's preexisting low back condition was permanently aggravated each and every work day while claimant was performing the heavy work activities for the respondent until claimant was taken off work because of his injuries on November 30, 1998. Thus, KBI argues that claimant's appropriate accident date is November 30, 1998, and TIG is liable for all workers compensation benefits awarded in this case. In the alternative, if the Board finds the claimant's accident date is November 15, 1996, then KBI contends the claim is barred because claimant failed to serve respondent with a timely written claim for compensation.

Claimant contends the work disability award should be based on a 97 percent task loss and a 100 percent wage loss for 98.5 percent work disability instead of the 87.5

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[1] *See* K.S.A. 44-510f(a)(3) (Furse 1993).

percent work disability found by the ALJ. As pointed out above, the 87.5 percent work disability reaches the $100,000 statutory maximum amount that can be paid an injured worker for permanent partial general disability. Thus, it is of no real consequence of whether claimant is awarded work disability of 87.5 percent or 98.5 percent.

In summary, the following issues will be reviewed by the Board:

1. What is claimant's date of accident?
2. What is the nature an extent of claimant's disability?
3. For what period is claimant entitled to temporary total disability compensation?

Findings of Fact and Conclusions of Law

After reviewing the record, considering the briefs and the parties' arguments, the Board makes the following findings and conclusions:

DATE OF ACCIDENT

The Board finds the ALJ's conclusion that claimant's accident date is November 30, 1998, the date claimant was taken off work because of his work-related injuries, should be affirmed. The Board finds the ALJ's findings and conclusions on this issue are accurate and supported by the facts and the law. It is not necessary to repeat the ALJ's findings and conclusions in this Order . The Board approves those findings and conclusions in the Award and adopts them as its own.

In particular, the Board finds the November 30, 1998, accident date is supported by claimant's testimony and the persuasive testimony of one of claimant's treating physicians, orthopedic surgeon Brian K. Ellefsen, D.O.

There are some facts in this case that are not disputed. One is that claimant 's work activities were heavy and strenuous while he was working for the respondent from January 1990, until he was taken off work on November 30, 1998, except for two brief periods when claimant left respondent's employment and returned. Also, as evidenced by a January 8, 1997, MRI examination, claimant, although at the time only 29 years old, suffered from degenerative disc disease at multiple levels of his lumbar spine.

During the time claimant worked for respondent from January 1990, until November 30, 1998, claimant reported low back problems from performing his work activities on some eighteen separate occasions. Most of the time claimant was able to continue working without medical treatment or else he obtained adjustments from a chiropractor in order to continue with his heavy work activities. But starting with the November 15, 1996, incident

of lifting bundles of shingles, claimant required more extensive medical treatment and was either given work restrictions or was taken off work because of the pain.

For the November 15, 1996, incident, claimant first was treated by a chiropractor. Claimant did not improve and respondent, who at that time had workers compensation coverage with KBI, referred claimant for further examination and treatment with physiatrist Kevin D. Komes, M.D. Dr. Komes first saw claimant on January 3, 1997, and provided claimant with conservative treatment in the form of work restrictions, medication, physical therapy, and stretching exercises. On April 4, 1997, the doctor discharged claimant from his care with no permanent restrictions and no permanent functional impairment rating.

On May 1, 1997, claimant was lifting aluminum concrete forms and again hurt his low back at work. Claimant returned to see Dr. Komes on May 5, 1997. This time Dr. Komes took claimant off work and because he showed no improvement, referred claimant to orthopedic surgeon John G. Yost, M.D.

Dr. Yost saw the claimant on one occasion, May 28, 1997. Dr. Yost found claimant with multiple level degenerative disc disease of the lumbar spine aggravated by his work activities. The doctor's diagnosis was lumbar sacral sprain with radiculopathy. Claimant was given back exercises which he was to do on a daily basis on his own. Dr. Yost prescribed a back support for claimant to use daily at work, permanently restricted claimant's lifting to 40 pounds and medication was prescribed for claimant to take for pain. Claimant remained off work until June 16, 1997.

On September 18, 1997, a part of a roof fell on claimant as the roof was being placed on a modular home that had been delivered. Claimant injured his neck and re-injured his low back. Respondent provided medical treatment through the company physician Earl B. Gehrt, M.D. Dr. Gerht first saw claimant on September 22,1997, and provided claimant with conservative treatment in the form of medication , a neck brace, and claimant was taken off work until September 29, 1997.

On January 28, 1998, claimant reported low back and right leg pain from repetitive lifting at work. KBI referred claimant to orthopedic surgeon Robert J. Takacs , M.D. in Kansas City, Missouri. Dr. Takacs saw claimant on March 9, 1998. He found claimant with multiple level degenerative disc disease of the lumbar spine. Dr. Takacs' diagnostic impression was degenerative disc disease with persistent pain. At that time, Dr. Takacs recommended claimant undergo a CT scan. But his recommendation was not followed because respondent's insurance coverage had changed on January 15, 1998, from KBI to TIG. Neither insurance company would accept responsibility for any further treatment of claimant's low back problems.

Claimant, at his attorney's request, was seen by orthopedic surgeon Brian K. Ellefsen, D.O. Dr. Ellefsen first saw claimant on June 2, 1998. He diagnosed claimant with discogenic low back pain. The doctor recommended that claimant be restricted from lifting no greater than 25 pounds and no repetitive bending. Additionally, he recommended that claimant take pain, anti-inflammatory and muscle relaxant medication plus epidural steroid injections.

In an attempt to obtain necessary medical treatment for his continuing low back problems, at claimant's attorney's request, a preliminary hearing was held before the ALJ on October 29, 1998. In a November 6, 1998, preliminary hearing Order, the ALJ ordered respondent and its insurance carrier TIG to pay all outstanding medical bills as authorized medical treatment expenses and appointed Dr. Ellefson to be claimant's authorized treating physician.

Before the preliminary hearing, claimant was injured again on August 18, 1998, when he fell from a chimney at work and aggravated his low back condition. He returned to see Dr. Ellefsen on November 30, 1998. At that time, Dr. Ellefsen prescribed three separate medications plus set appointments for claimant to have two epidural steroid injections. Dr. Ellefsen also took claimant off work on November 30, 1998, and kept him off work until July 1, 1999, when Dr. Ellefsen determined claimant had met maximum medical improvement and released claimant with permanent work restrictions.

Dr. Ellefsen testified in this case and was unequivocal that claimant injured his back "over time" while performing his regular work activities while employed by the respondent. Claimant testified in this case on four separate occasions and established through his testimony that the heavy and strenuous repetitive work activities he was required to perform while employed by the respondent aggravated his low back condition and made it worse. Claimant also established through his testimony that although some physicians placed restrictions on his work activities he continued to perform heavy strenuous work activities outside those restrictions. Respondent's owner, Stanley Luebbering, also testified in this case and indicated that he did not enforce the restrictions placed on claimant and left it up to claimant's discretion whether to work within those restrictions.

The Board acknowledges that Dr. Takacs expressed the opinion that after claimant's November 15, 1996, accident, claimant's low back condition was not permanently aggravated and made worse. Dr. Takacs also testified that he did not know the claimant had returned to work after he had seen claimant on March 8, 1998, and had continued to do the heavy work required by the respondent until he was taken off work on November 30,1998. Assuming that fact, plus claimant's testimony that his low back continued to worsen and considering claimant's degenerative lumbar disc problems, Dr. Takacs opined that continuing to perform the heavy work could have aggravated claimant's preexisting low back condition and made it worse.

When a workers usual work tasks aggravates a preexisting condition, the resulting injury and disability is compensable.[2] Here, the Board concludes the evidence has proven that claimant had a preexisting degenerative disc disease of the lumbar spine that was permanently aggravated and made worse by heavy work activities he had to perform while working for respondent. Those heavy work activities continually aggravated claimant's preexisting low back condition until he was taken off of work on November 30, 1998. Thus, the appropriate date of accident for this repetitive trauma case is the last day claimant was exposed to the repetitive injury.[3]

NATURE AND EXTENT OF DISABILITY

The Board finds the ALJ's conclusion that claimant suffered a 20 percent permanent functional impairment and an 87.25 percent work disability as a result of the November 30,1998, accident should be affirmed. Both Dr. Takacs and Dr. Ellefsen agreed, in accordance with the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, that claimant's resulting permanent functional impairment rating was 20 percent.

But Dr. Takacs and Dr. Ellefsen disagreed on the permanent restrictions that should be imposed on claimant's activities and this, therefore, impacted their opinions on the work task loss component of the work disability test.[4] The claimant had vocational expert, Karen Crist Terrill, develop a work task list for the jobs claimant had performed in the 15 years next preceding his accident date. Dr. Ellefsen reviewed that list of 37 work tasks and opined, based on the restrictions he had imposed on claimant and the medications claimant was required to continue to take, that claimant could no longer perform 37 of the 38 work tasks for a 97 percent work task loss.

Dr. Takacs, on the other hand, reviewed a work task list developed by vocational expert, James T. Molski, who was employed by respondent. Based on the restrictions he had imposed on claimant's activities, Dr. Takacs reviewed the 31 work tasks developed by Mr. Molski and opined that claimant could no longer perform 16 of those 31 for a 52 percent work task loss.

Although Dr. Ellefsen and Dr. Takacs had differing opinions on whether claimant permanently aggravated his low back condition after the November 15, 1996, accident, both had the opportunity to examine claimant after he was taken off work on November 30,

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[2] *See* Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 379, 573 P 2d 1036 (1978).

[3] *See* Treaster v. Dillon Companies, Inc., 267 Kan. 610, Syl. ¶3, 987 P.2d 325 (1999).

[4] *See* K.S.A. 1998 Supp. 44-510e(a).

1998. Therefore, both based their opinions concerning functional impairment and permanent restrictions on claimant's condition after claimant left respondent's employment. Both opinions are credible and should be given some weight.

Based primarily on the fact that claimant did return to work after he was examined by Dr. Takacs on March 8, 1998, and continued to perform his heavy and strenuous job duties until he was taken off work on November 30, 1998, the Board finds that claimant's permanent restrictions and work task loss lies somewhere between Dr. Takacs' opinion and Dr. Ellefsen's more restrictive opinion. Thus, the Board concludes, as did the ALJ, that both doctor's task loss opinions should be given equal weight resulting in a 74.5 percent work task loss.

In regard to wage loss, claimant testified, at the regular hearing held on December 1, 1999, that after July 1, 1999, when he had met maximum medical improvement and was released by Dr. Ellefsen with permanent restrictions, he started looking for appropriate employment and was still actively looking for employment but without success. Admitted into evidence at the regular hearing was a list of some 15 different employers claimant had contacted concerning employment. Claimant also testified that the 15 employers on the list were located in Chanute where he lived and he had also contacted other employers outside of Chanute but could not recall the names of those employers.

The Board, under different circumstances, would not necessarily find contacting three employers per month was a good faith effort to find appropriate employment. But in this case the Board does find good faith. Claimant's occupational history consists primarily of physical labor, requiring heavy lifting, standing, bending and twisting. Both Dr. Takacs' restrictions and specifically Dr. Ellefsen's more limiting restrictions prohibit claimant from performing these physical labor type jobs. Therefore, the jobs that are available for claimant to perform are very limited. Taking into consideration claimant's limited educational background and employment history, the Board finds it would be unreasonable to require claimant to apply for jobs he is neither qualified to perform based on his educational background or apply for jobs clearly outside his restrictions just to establish numbers to show good faith. Furthermore, respondent never offered claimant either vocational rehabilitation or job placement assistance. Although respondent hired a vocational expert to interview the claimant, it was only for purposes of litigation. In fact, the only evidence contained in the record that claimant has the post-injury ability to find and perform work in the open labor market is Mr. Molski's opinion, based on Dr. Takacs' restrictions, that claimant has the ability to find and perform jobs that pay $6.00 per hour. But Ms. Terrill, taking into consideration Dr. Ellefsen's more limiting restrictions, opined that claimant was realistically unemployable. The Board finds, based on the record as a whole, that claimant is capable of working, but the jobs available in claimant's labor market are limited and, therefore, the number of jobs available for claimant to apply for are also

limited. In addition, the geographic area claimant lives in has no large cities and, therefore, has a limited labor market.

The respondent terminated claimant pursuant to a letter dated January 8, 1999, sent to claimant by respondent's owner, Stanley Luebbering. Mr. Luebbering indicated in that letter that claimant was terminated because he had not "provided me [Mr. Luebbering] with a legitimate explanation of why you have failed to come to work for over two months." Also, Mr. Luebbering mentioned an off-work slip that was from Dr. Ellefsen that was dated November 31, 1998, instead of November 30, 1998. The letter also noted that Mr. Luebbering had seen in the paper that claimant had been arrested.

During Mr. Luebbering's deposition testimony, he was asked to clarify why claimant was terminated, Mr. Luebbering refused to answer any questions about the termination except for repeating the reasons contained in the January 8, 1999, letter. But Mr. Luebbering did establish that respondent had no written policy with regard to the frequency an employee has to contact respondent when taken off work by a physician. In fact, the record establishes that claimant notified respondent's office manager, Glenda Welch, on December 2, 1998, that he had gone to Dr. Ellefsen and could not work because of the medication he had been prescribed. Claimant returned to Dr. Ellefsen on December 16, 1998, who then gave claimant an off-work slip that was mistakenly dated November 31, 1998, which Dr. Ellefsen during his testimony clarified was a mistake made by his office staff. On December 31, 1998, claimant also had a conversation with Mr. Luebbering and told him that he was unable to work because he had epidural injections scheduled. Dr. Ellefsen testified that he had taken claimant off work as of November 30, 1998, and did not release claimant to return to work until July 1, 1999, when claimant had met maximum medical improvement and the very limiting restrictions were imposed by Dr. Ellefsen.

The Board finds the respondent terminated claimant while he was under Dr. Ellefsens' care and treatment and unable to work. Additionally, respondent terminated claimant even though he did communicate to respondent that he was under the care of his treating physician and his treating physician also provided respondent with off-work slips. Additionally, there is no evidence in the record that respondent would have accommodated claimant's permanent restrictions imposed by either Dr. Takacs or Dr. Ellefsen. The record is clear that claimant could no longer perform the delivery foreman job for the respondent within the restrictions imposed by either Dr. Takacs or Dr. Ellefsen.

The Board, therefore, affirms the ALJ's conclusion that claimant's termination was not the result of bad faith or any wrong doing on claimant's part and the termination does not disqualify him from his entitlement to a work disability award.[5] Additionally, the Board

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[5] *See* Niesz v. Bill's Dollar Stores, 26 Kan. App. 2d 306, 944 P. 2d 179 (1997).

affirms the ALJ's decision that after claimant was determined to have met maximum medical improvement and released with permanent restrictions by Dr. Ellefsen, claimant made a good faith effort to find appropriate employment. [6] Accordingly, the Board affirms the ALJ's conclusion that the wage loss component of the work disability test is 100 percent.[7]

The Board also finds it is appropriate to note under the issue of nature and extent of claimant's disability that claimant had a preexisting degenerative disc disease condition of the lumbar spine. If an injured worker's disability is caused by an aggravation of a preexisting condition, then any award of compensation shall be reduced by the amount of permanent functional impairment determined to be preexisting.[8] But the Board finds the issue of claimant's preexisting functional impairment to reduce claimant's award of compensation was neither argued nor raised by the respondent. The burden of proving claimant's amount of preexisting impairment as a deduction from his total award of compensation belongs to the respondent once the claimant has come forward with evidence of aggravation or acceleration of a preexisting condition.[9]

Additionally, the Board concludes that since this is a repetitive use injury that occurred over a period of time and more than one insurance carrier had workers compensation coverage, KBI should remain responsible for the temporary total disability compensation and medical expenses incurred during its period of coverage. And TIG should be responsible for temporary total disability compensation, medical expenses, permanent partial general disability and future medical expenses, commencing with its coverage period and thereafter.[10]

TEMPORARY TOTAL DISABILITY

The ALJ awarded claimant 22.07 weeks of temporary total disability compensation for the period from November 30, 1998, through April 14, 1999. Dr. Ellefsen's testimony and his medical records prove that claimant was taken off work from November 30, 1998, through July 1, 1999, a total of 30.43 weeks. Also, contained in the Award is a stipulation

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[6] *See* Copeland v. Johnson Group.Inc., 24 Kan. App.2d 944 P.2d 179 (1997).

[7] *See* K.S.A. 1998 Supp. 44-510e(a).

[8] *See* K.S.A. 1998 Supp. 44-501(c).

[9] *See* Hanson v. Logan USD 316, 28 Kan. App. 2d 92, Syl. ¶5, 11 P. 3d 1184, *rev. denied* ___ *Kan.* ___*(2001).*

[10] *See* Lott-Edwards v. Americold Corp., 27 Kan. App. 2d 689, 697-698, 6 P. 3d 947 (2000).

that is clarified by KBI's attorney, at the regular hearing, that KBI paid claimant a total of $740.15 at $279.84 per week of temporary total disability compensation. Accordingly, the Board concludes that claimant is entitled to 2.64 weeks of temporary total disability compensation[11] at $279.84 per week or $740.15, followed by 30.43 weeks of temporary total disability compensation at $335.23 per week or $10,201.05, for a total award of temporary total disability compensation in the amount of $10,941.20.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that ALJ Jon L. Frobish's June 29, 2000, Award, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF the claimant, Bill Hegwald, and against respondent, Advance Systems Homes, Inc., and its insurance carriers, TIG Insurance Company and Kansas Building Industry Workers Compensation Fund, for an accidental injury sustained on November 30, 1998, and based on an average weekly wage of $502.82.

Claimant is entitled to 2.64 weeks of temporary total disability compensation at $270.84 per week or $740.15, followed by 30.43 weeks of temporary total disability compensation at the rate of $335.23 per week or $10,201.05, followed by $89,058.80 of permanent partial general disability compensation to be paid at $335.23 per week for a 87.25 percent permanent partial general disability, making a total award not to exceed $100,000.

As of July 28, 2001, there is due and owing claimant 2.64 weeks of temporary total disability compensation at the rate of $279.84 per week or $740.15, followed by 30.43 weeks of temporary total disability compensation at the rate of $335.23 per week or $10,201.05, followed by 105.50 weeks of permanent partial general disability at the rate of $335.23 per week in the sum of $35,366.77, for a total of $46,307.97, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $53,692.03 is to be paid at $335.23 per week, until fully paid or further order of the Director.

KBI is responsible for payment of medical expenses and temporary total disability compensation incurred during its coverage period and TIG is responsible for payment of temporary total compensation and medical expenses as well as permanent partial general

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[11] The 2.64 weeks is rounded to the nearest hundredth of a week determined by dividing $279.84 per week into $740.15.

disability compensation and future medical expenses upon application and approval by the Director commencing with its coverage period and thereafter.

All remaining orders contained in the Award are adopted by the Board.

IT IS SO ORDERED.

Dated this ____ day of July, 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Pittsburg, Kansas
Stephen J. Jones, Wichita, Kansas
Matthew Crowley, Topeka, Kansas
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director